

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

CHARLESTON DIVISION

JAMES HILL CALL,

Plaintiff,

v.

CIVIL ACTION NO. 2:13-cv-27629

JIM RUBENSTEIN, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

Pending is the Plaintiff's letter-form notice that he does not wish to prosecute this civil action. [ECF 11].

By Standing Order entered April 8, 2013, and filed in this case on November 5, 2013, this action was referred to United States Magistrate Judge Dwane L. Tinsley for submission of proposed findings and a recommendation for disposition ("PF&R"). On July 21, 2014, Magistrate Judge Tinsley issued a PF&R [ECF 7] recommending that the Court find that Plaintiff's Complaint fails to state a claim upon which relief may be granted against defendants Jim Rubenstein and David Ballard and that such defendants should be dismissed under 28 U.S.C. § 1915A.

On that same date, Magistrate Judge Tinsley issued an Order granting Plaintiff's application to proceed without prepayment of fees and costs [ECF 1], except to the extent that Plaintiff was required to pay the full amount of the filing fee of \$350.00 in monthly payments as detailed in that Order. Magistrate Judge Tinsley further provided notice to Plaintiff that if he did

not wish to pay the filing fee set forth in the Order, that he must notify the Court by writing within 30 days stating that he did not wish to prosecute this civil action.

Plaintiff's letter directly responds to Magistrate Judge's Tinsley's July 21, 2014, Order, and advises the Court that he does not wish to pay the filing fee as set forth in the Order. Plaintiff further requests that this civil action be dismissed without prejudice.¹

Federal Rule of Civil Procedure 41(a)(1) permits the voluntary dismissal of a Complaint and provides, in pertinent part, that "a plaintiff may dismiss an action without a court order by filing . . . a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment" Additionally, Rule 41 further provides that "[e]xcept as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2).

Here, a summons has been returned executed as to Defendant Wexford Health Services, Inc. [ECF 10], but no defendant has yet filed an answer or a motion for summary judgment. Accordingly, the Court finds that dismissal pursuant to Fed. R. Civ. P. 41(a)(1) is proper.

Moreover, to the extent that Plaintiff's letter-form notice could be construed as a motion to voluntarily dismiss his Complaint pursuant to Rule 41(a)(2), the Court further finds that permitting dismissal without prejudice under these circumstances is proper and **GRANTS** the motion [ECF 11].

Accordingly, the Court **DIRECTS** that this civil action be **DISMISSED WITHOUT PREJUDICE** as to all defendants. In light of this disposition, it is **ORDERED** that Plaintiff need not make monthly payments of the filing fee as described in Magistrate Judge Tinsley's July 21,

¹ The Court notes that objections to the July 21, 2014, PF&R in this case were due on August 7, 2014. To date, no objections have been filed.

2014, Order [ECF 6]. Furthermore, in light of this disposition, the Court **DECLINES TO ADOPT AS MOOT** the PF&R [ECF 7].

IT IS SO ORDERED.

The Court **DIRECTS** the Clerk to send a copy of this Order to Plaintiff, to any counsel of record that may appear for Defendants, and to the Trustee Clerk at the Mount Olive Correctional Complex.

ENTER: August 14, 2014



THOMAS E. JOHNSTON
UNITED STATES DISTRICT JUDGE